

# McNamara Declaration

## Exhibit 20

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

HACHETTE BOOK GROUP, INC., ) Case No.  
HARPERCOLLINS PUBLISHERS LLC, ) 1:20-CV-04160-JGK  
JOHN WILEY & SONS, INC., and )  
PENGUIN RANDOM HOUSE, LLC, )  
)  
Plaintiffs, )  
v. )  
)  
INTERNET ARCHIVE and DOES 1 )  
through 5, inclusive, )  
)  
Defendants. )  
-----)

\*\*\*CONFIDENTIAL - ATTORNEYS EYES ONLY\*\*\*

REMOTE PROCEEDINGS OF THE  
VIDEOTAPED DEPOSITION OF STEVE POTASH,  
INDIVIDUALLY AND AS A 30(B)(6) WITNESS  
FOR OVERDRIVE, INC.  
MONDAY, JANUARY 31, 2022

REPORTED BY NANCY J. MARTIN  
CSR. NO. 9504, RPR, RMR  
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1           A. This would be the amount we invoiced the  
2 library.

3           Q. The library.

4                   And this would apply -- the dollar amount  
5 isn't necessarily -- actually, let me ask this.  
6 Sorry.

7                   When there is -- when a library gets access  
8 to a book or makes a purchase on a model other than  
9 cost per checkout, when would the revenue appear? In  
10 other words, if a library purchases a 24-month --  
11 access for 24 months for a certain amount of money,  
12 does that money appear at the beginning or spread out  
13 over the 24 months?

14           A. When a title is set live in the library's  
15 catalog available to be borrowed, in that month we  
16 will invoice a library as activity for the month.

17           Q. So it's the month -- the money -- the dollar  
18 amount appears in the month in which the library was  
19 used; is that right?

20           A. The month that the library placed the order,  
21 yes.

22           Q. And for cost per circulation transactions,  
23 that would be the month in which the circulation  
24 occurred; is that right?

25           A. At the end of the month, the library would be

1 A. Generally, yes.

2 Q. What is -- what is the differential?

3 A. I mean are you asking as far as number of  
4 actual library accounts and academic versus public?

5 Q. Yes.

6 A. As stated earlier, there are thousands of  
7 individual communities that have access to OverDrive  
8 to consortium insured collections. So if we look at  
9 every community as an individual library, we would be  
10 in the thousands of public libraries.

11 If we look at U.S. university libraries,  
12 academic libraries, we would be in the low hundreds,  
13 maybe 2-, 300, I'm going to guess, in the U.S.

14 Q. Okay. And so as OverDrive acquires -- is it  
15 fair to say that OverDrive acquires digital works from  
16 publishers under various terms and models?

17 A. OverDrive is granted permission to  
18 redistribute and service institutions under agreements  
19 with suppliers, publishers, and aggregators.

20 Q. And that generally involves some compensation  
21 paid by -- paid by OverDrive for the digital works; is  
22 that right?

23 A. It typically involves following a sale to an  
24 institution or a license or access plan, sharing the  
25 revenue under the agreed distribution terms we

1 Q. And are you aware that Internet Archive calls  
2 these libraries "partner libraries"?

3 A. I'm not familiar with all their terminology  
4 or their public pages, but that doesn't surprise me as  
5 they may label participating libraries as partners.

6 Q. Do you have a sense of how many libraries  
7 have become partner libraries with the Internet  
8 Archive?

9 A. No.

10 Q. Can you tell me approximately how many public  
11 libraries there are in the United States?

12 A. I believe there's approximately 9,000  
13 libraries that operate with branches and extensions  
14 that may total in the 15,000 if you count every  
15 location, and I think that's -- I recollect those  
16 general numbers.

17 Q. And those are just public library numbers; is  
18 that correct?

19 A. Correct.

20 Q. And of those, you said a total of  
21 approximately 15,000 public libraries, how many are  
22 customers, approximately, of OverDrive?

23 A. Again, that larger number would include all  
24 the branches of some of the large metro systems. So  
25 it's a smaller number. But I will approximate that 93

1 to 94 percent of the U.S. public libraries have some  
2 access to digital book lending with OverDrive, 90-plus  
3 percent.

4 Q. Okay. And if I were to tell you that there  
5 are today only about 2 or 3, 4 public libraries that  
6 have signed on to be partner libraries with Internet  
7 Archive, would that surprise you?

8 MR. GRATZ: Objection to form.

9 THE WITNESS: No. I do recall, when I was  
10 reviewing some of the materials, the names of  
11 San Francisco Public Library and one or two others.  
12 So I know it was -- there were -- just from my  
13 recollection, more academic libraries and few public  
14 libraries in that list. I don't recall the date I may  
15 have seen that, but...

16 BY MS. MCNAMARA:

17 Q. Do you have any sense as to why there would  
18 be more academic libraries than public libraries that  
19 might -- that would be partner libraries with Internet  
20 Archive?

21 MR. GRATZ: Objection to form.

22 THE WITNESS: Yes.

23 BY MS. MCNAMARA:

24 Q. What is your sense?

25 A. Well, academic libraries have, for decades,

1 Q. Okay. While I wait for him, let me ask you  
2 something, Mr. Potash.

3 The -- I'd like to address, if I might, what  
4 might appear to be some self-evident facts concerning  
5 OverDrive's library customers who all buy or license  
6 the digital works they distribute, and these questions  
7 only go to the public library customers of OverDrive.  
8 Okay?

9 You would agree with me that the public  
10 libraries are not commercial entities; is that right?

11 A. Yes.

12 Q. And you would agree that these libraries  
13 support the teaching and research and scholarship of  
14 their communities, did they not?

15 A. Yes.

16 Q. And would you agree that these public  
17 libraries, that they buy or license digital works,  
18 that they often own a physical copy of the same work?

19 MR. GRATZ: Objection to form. Lacks  
20 foundation.

21 THE WITNESS: Yes.

22 BY MS. MCNAMARA:

23 Q. And would you agree with me that many of the  
24 public libraries that are your customers, that they  
25 serve rural communities?

1 A. Yes.

2 Q. And that they serve disabled communities?

3 A. Yes.

4 Q. And that they serve poor communities or  
5 impoverished communities in certain circumstances.  
6 Isn't that right?

7 A. Yes.

8 Q. And yet, they are all licensing the right to  
9 distribute the digital works from OverDrive. Isn't  
10 that right?

11 A. We are a supplier of significant amounts of  
12 digital books, and we donate also. So yes.

13 Q. And one of the by-products of the libraries  
14 who are your clients or customers and who purchase  
15 from OverDrive is that they're making digital copies  
16 in a more convenient way to their members.

17 MR. GRATZ: Objection to form.

18 BY MS. MCNAMARA:

19 Q. Let me ask it this way. That wasn't very  
20 clear.

21 The eBooks that are made available through  
22 the libraries who are your customers, I believe we  
23 determined those eBooks can be available 24 hours a  
24 day. Isn't that right?

25 A. Yes.

1 A. Yes.

2 Q. And so they're -- these statewide collections  
3 are customers of OverDrive, and so they have eBooks  
4 available; is that correct?

5 A. Yes.

6 Q. So if they have statewide collections, those  
7 works would be available to all residents of that  
8 state, whether urban or rural; is that correct?

9 A. Yes.

10 Q. And then you indicated that several states  
11 have reciprocal lending arrangements.

12 Do you recall that?

13 A. It's not states having reciprocal lending.  
14 Typically, within a state, two or more libraries or  
15 two or more consortiums, we enable reciprocal access  
16 to the members' collections for any cardholder.

17 Q. And that creates greater ability of the works  
18 to the public. Isn't that correct?

19 A. Absolutely, yes.

20 Q. And so it would be greater availability to  
21 all types of potential readers, whether they be rural  
22 or disabled or poor or whatever; is that right?

23 A. Yes.

24 Q. You mentioned the -- I forget the term of art  
25 for it, your kind of library card or digital library

## [juvenile - libraries]

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C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.



Nancy J. Martin, RMR, CSR

Dated: February 2, 2022

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